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Appellants:	Paul J. Datta et al.	Docket No.:	15,075
Serial No.:	10/017,894	Group:	3761
Confirmation No:	9031	Examiner:	Karin M. Reichle
Filed:	December 14, 2001	Date:	April 6, 2007
For:	A PRE-FASTENED ABSORBENT ARTICLE HAVING SIMPLIFIED FASTENING FEATURES		

Substitute Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellants respectfully submit this substitute Brief in support of their Appeal of Examiner Reichle's Final Rejection of claims 2, 9-10, 15-17 and 22 which was mailed on July 6, 2006 and in response to Notification of Non-Compliant Appeal Brief mailed on March 15, 2007.

On October 6, 2006, Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal which was received in the USPTO on October 10, 2006. Thus, the time period for filing this Brief ended on December 10, 2006. This substitute Appeal Brief is filed within the 1 month period for reply.

Real Party In Interest

The real party in interest is Kimberly-Clark Worldwide, Inc., the assignee of record.

Related Appeals and Interferences

To the knowledge of appellant, appellant's legal representative, or assignee, there are no other known related interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 1, 7 and 8 have been canceled. Claims 2, 9-10, 15-17 and 22 are currently pending in the application and are the claims on appeal. Claims 3-6, 11-14, and 18-21 were withdrawn. A copy of the appealed claims appears in the Claims Appendix of this Brief.

Status of Amendments

No amendments were filed after the Final Office Action mailed July 6, 2006.

Summary of Claimed Subject Matter

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal. The invention of Independent Claim 22 provides a distinctive pant-like, prefastened, disposable absorbent article 20. The article includes an absorbent 28, a front waist region 22, a back waist region 24, and a crotch region 26 that extends between and connects the waist regions 22, 24. (Page 12, lines 17-20, Fig. 1). The absorbent article 20 also includes a longitudinal direction 38, a lateral direction 40, an exterior surface 36, an interior surface 34 opposite the exterior surface 36, a pair of laterally opposed side edges 30, and a pair of longitudinally opposed waist edges 32. (Page 12, lines 19-28). The absorbent article 20 further includes a multiple property fastener 60 attached in one of the front waist region 22 and the back waist region 24. (Page 13, lines 4-6). The multiple property fastener 60 includes at least two zones 65, 67, at least one engagement zone 65 of a first mechanical fastening material and at least one non-abrasive zone 67 of a second mechanical fastening material. (Page 13, lines 8-10). Further, the first mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus greater than about 30 kilopounds per square inch and the second mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus between about 7 kilopounds per square inch and about 30 kilopounds per square inch. (Page 24, lines 19-28).

Grounds of Rejection To Be Reviewed on Appeal**Ground 1**

Claims 2, 9, 10, 15-17 and 22 stand rejected under 35 U.S.C. § 102(b) or in the alternative, under 35 U.S.C. § 103(a) as being unpatentable over [1] U.S. Patent No. 5,957,908 to Kline et al. (herein "the Kline patent") and thereby [2] U.S. Patent No. 4,946,527 to Battrell (herein "the Battrell patent").

Argument**ARGUMENT**

For the reasons set forth below, Appellants respectfully submit that the Examiner's rejection should be reversed.

Claim Language Interpretation (Paragraph 5 of the Office Action mailed July 6, 2006)

In the Office Action mailed July 6, 2006, the Examiner believes that "disposable" is defined as set forth on page 11, lines 19-21. Appellants agree that "disposable" is defined as set forth on page 11, lines 19-21.

The Examiner believes that "prefastened" is considered "as configured when fasteners are attached, i.e. a pant-like configuration, to be pulled up or down over the hips of a wearer, i.e. prior to application to the wearer, but does not require forming of such configuration during the manufacturing process." Appellants respectfully disagree. Appellants assert that the articles of the invention are formed in a pant-like configuration during the manufacturing process. Prefastened articles are described throughout the specification; for example:

Page 2, lines 3-6:

Conventional diapers are not provided in a "prefastened" condition...

Page 2, lines 15-17:

...such conventional diapers are not provided in a pant-like, prefastened configuration and, thus, are not configured to be pulled up or down over the hips of the wearer when the fasteners are attached.

Page 11, lines 10-16:

The prefastened absorbent articles are also refastenable such that they can be secured to and removed directly from the waist of the wearer and easily inspected to determine if they have been soiled during use. As such, the pant-like, prefastened, disposable absorbent articles of the present invention can function in a similar manner to conventional training pants when left in the prefastened, pant-like configuration, or they can be unfastened prior to or during use to function in a refastenable manner similar to conventional diapers.

Page 29, lines 33-35:

The hook and tape fasteners provided on currently available diapers cannot simply be positioned in a front waist region 22 of a diaper to provide a pant-like, prefastened configuration. Conventional fasteners do not have the proper dimensions to provide a functional prefastened article.

Therefore the specification supports, for purposes of the present invention, that a "prefastened" article is an article that is configured, when fasteners are attached, in a pant-like configuration, to be pulled up or down over the hips of a wearer, i.e. prior to application to the wearer, and does require forming of such configuration during the manufacturing process.

The Examiner believes the terms "multiple property" and "non-abrasive" have not been specifically defined and therefore will be accorded their common dictionary definition. The Examiner believes that "multiple property" is "defined as having more than one property, i.e. any property. Thus, "multiple property" is defined as having more than one property, i.e. any property." Appellants submit that the term "multiple property" must be interpreted as used in the claims, and the specification. For example, the Specification at page 4, lines 30-32 reads "[t]he multiple property fasteners of the invention provide multiple features such as reliable engagement and skin friendliness (or reduced abrasiveness) in a single fastener." (Emphasis added).

The Examiner believes the term "non-abrasive" is defined as not "causing abrasion, harsh, rough", not "to rub off or wear away by friction". Appellants submit that the term "non-abrasive" must be interpreted as used in the claims, and the specification. On page 4, lines 30-32, the specification reads, "[t]he multiple property fasteners of the invention provide multiple features such as reliable engagement and skin friendliness (or reduced abrasiveness) in a single fastener. Therefore, for purposes of the present invention, "non-abrasive" is defined as skin friendly.

With regard to the term "mechanical fastening material" the Examiner references page 9, lines 2-3, and page 22, lines 7-10. The specification reads at page 9, lines 2-3, "[i]n addition to using traditional hook and loop components, the multiple property fasteners could also be fabricated using adhesive or tape materials." Page 9, lines 2-3, does not reference the term "mechanical fastening material." The specification reads at page 22, lines 7-10, "[s]uitable fastening materials to provide the engageable portions of the multiple property fasteners 60 are well known to those skilled in the art and can include

adhesive tape tab fasteners, hook and loop fasteners, mushroom fasteners, snaps, pins, belts and the like, and combinations thereof." Page 22, lines 7-10, does not reference the term "mechanical fastening material." The specification at page 5, lines 29-32 reads, "[t]he first mechanical fastening material is desirably selected to provide strong engagement with another surface. When the mechanical fastening material is a hook-type material, it is desirable to select a hook that provides strong engagement with a loop-type material" (emphasis added). Accordingly, the specification supports that the term "mechanical fastening material" should be accorded the common definition as is known in the art and include at least hook-type material.

Rejection of Claims 2, 9-10, 15-17, and 22 under 35 U.S.C. §102(b)

In the Final Office Action mailed July 7, 2006, the Examiner rejects claims 2, 9-10, 15-17, and 22 under 35 U.S.C. § 102(b) as being unpatentable over U.S. Patent No. 5,957,908 issued to Kline et al. ("the Kline patent") and thereby U.S. Patent No. 4,946,527 issued to Battrell ("the Battrell patent").

It is respectfully submitted that claims 2, 9-10, 15-17, and 22 are patentable over the Kline patent and the Battrell patent. Accordingly, the Examiner's rejection under 35 U.S.C. § 102(b) should be reversed.

The Examiner believes the Kline patent discloses a fastener which has a longitudinal direction, a lateral direction, and multiple properties, i.e. different strengths and permeabilities, and thereby the Battrell patent has both the property of sheer stress resistance and peel force which can be different in various portions. The Examiner also believes the Kline patent discloses at least one engagement zone of a first mechanical fastening material and at least one engagement zone of a second mechanical fastening material (see, e.g., col. 23, lines 9-23 and col. 17, line 14 - col. 18, line 6). The Examiner further believes the Kline patent at col. 22, lines 9-12 discloses that the fasteners do not irritate the wearer's skin. The Examiner believes the Kline patent discloses all the claimed structure and function. The Examiner acknowledges that the Kline patent does not disclose the first and second materials having different specific ranges of flexure modulus. The Examiner believes that there is sufficient factual basis for one to conclude that the materials of the zones taught by the Kline patent inherently include the same flexure modulus as that claimed when tested similarly. Alternatively, the Examiner believes that it would have been obvious to one having ordinary skill in the art to employ a first material of the claimed flexure modulus and a second material of the claimed flexure modulus since it has been held that where the general conditions of a claim are disclosed discovering the optimum or workable ranges involves only routine skill in the art. The Examiner cites In re Aller in support of this position.

Discussion Regarding Claim 2

With regard to claim 2, the Examiner references "Fig. 7, col. 16, lines 30-62, col. 17, line 14 - col. 18, line 6, col. 18, lines 8-9 and col. 22, lines 17-19." The Examiner also believes the Kline patent discloses "the zone 253" or a portion thereof and an equal and adjacent portion of "zone 254" can include the "engaging component 202" and such "zone 253" or portions thereof and equal portion of "zone 254" define the fastener area.

Discussion Regarding Claims 9-17

With regard to claim 9, the Examiner references col. 17, lines 62-63, and lines 32-37 of the Kline patent, and thereby col. 8, lines 40-41 of the Battrell patent.

With regard to claim 10, the Examiner references col. 17, lines 32-37 of the Kline patent, and thereby col. 8, lines 30-56 of the Battrell patent.

With regard to claim 15, the Examiner references Fig. 3 of the Kline patent.

With regard to claim 16, the Examiner references col. 21, lines 5-16, Fig. 2, and col. 12, lines 26-29 of the Kline patent, and believes the Kline patent discloses the landing member would be identical to the fastener of claim 1, and thus would engage the engaging component of the rear waist region.

With regard to claim 17, the Examiner references Figs. 2, 3 and 7 of the Kline patent.

In order to be anticipatory, a reference must explicitly or implicitly disclose each and every element of the claimed invention. The Kline patent relates to absorbent articles having elastomeric ear panels and a fastening system that provides the user with different options as to how the diapers will be fitted to the wearer. (See col. 1, lines 5-11). The Kline patent does not disclose each and every element of the claimed invention.

Discussion Regarding Claim 22

Independent claim 22 of the present invention is directed to a pant-like, prefastened, disposable absorbent article that includes an absorbent, a front waist region, a back waist region, and a crotch region that extends between and connects the waist regions. The claimed absorbent article also includes a longitudinal direction, a lateral direction, an exterior surface, an interior surface opposite the exterior surface, a pair of laterally opposed side edges and a pair of longitudinally opposed waist edges. The absorbent article further includes a multiple property fastener attached in one of the front waist region and the back waist region. The multiple property fastener includes at least two zones: one engagement zone of a first mechanical fastening material and one non-abrasive zone of a second

mechanical fastening material. Further the first mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus greater than about 30 kilopounds per square inch and the second mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus between about 7 kilopounds per square inch and about 30 kilopounds per square inch.

The Kline patent does not disclose (either explicitly or implicitly) each and every element of the claimed invention. For example, the Kline patent does not disclose an article including a multiple property fastener including two mechanical fastening materials where the first mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus greater than about 30 kilopounds per square inch and the second mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus between about 7 kilopounds per square inch and about 30 kilopounds per square inch.

The Examiner believes that there is sufficient factual basis for one to conclude that the materials of the zones taught by the Kline patent inherently include the same flexure modulus as that claimed when tested similarly.

The Examiner is making an inherency argument. MPEP 2112.01 states that "[w]here the claimed and prior art products are identical or substantially identical in structure ... a *prima facie* case of either anticipation or obviousness has been established" (emphasis added). The Kline patent and the claimed structure are not identical or substantially identical in structure. The Kline patent does not disclose a first mechanical fastening material that is comprised of a polymeric material selected to have a flexural modulus greater than about 30 kilopounds per square inch and a second mechanical fastening material that is comprised of a polymeric material selected to have a flexural modulus between about 7 kilopounds per square inch and about 30 kilopounds per square inch. The Examiner has not pointed out where in the Kline patent a first fastener material comprising a first polymeric material is disclosed and a second fastener material comprising a second polymeric material is disclosed. Thus, the premise on which the inherency argument is based is incorrect. For at least this reason, Claim 22 is not anticipated by the Kline patent and the anticipation rejection should be reversed.

The Examiner alternatively believes that it would have been obvious to one having ordinary skill in the

art to employ a first material of the claimed flexure modulus and a second material of the claimed flexure modulus since it has been held that where the general conditions of a claim are disclosed discovering the optimum or workable ranges involves only routine skill in the art.

Rejection of Claims 2, 9-10, 15-17, and 22 under 35 U.S.C. §103(a)

In the Final Office Action mailed July 7, 2006, the Examiner rejects claims 2, 9-10, 15-17, and 22 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,957,908 issued to Kline et al. ("the Kline patent") and thereby U.S. Patent No. 4,946,527 issued to Battrell ("the Battrell patent").

It is respectfully submitted that claims 2, 9-10, 15-17, and 22 are patentable over the Kline patent and the Battrell patent. Accordingly, the Examiner's rejection under 35 U.S.C. § 103(a) should be reversed.

It is respectfully submitted that the Examiner's rejections under 35 U.S.C. §103(a), based on the teachings of the cited references are not proper, and that the teachings of the cited references do not render obvious a structure having the combination of components called for by Appellants' claimed invention. Further, it is respectfully submitted that the Examiner has not established "prima facie" that a proper combination of the cited references would teach or suggest Appellants' claimed invention.

It is well accepted that, as a minimum, a *prima facie* case of obviousness must contain the following elements:

- 1) there must be a basis in the reference for a modification;
- 2) there must be a reasonable expectation of success -- obvious to "try" is not the standard; and
- 3) the prior art must render obvious the invention as a whole.

When asserting a case of obviousness, it is not appropriate to engage in hindsight. Therefore, one may not pick and choose isolated elements from various prior art references and combine them so as to yield the invention in question when such combining would not have been an obvious thing to do at the time in question. *Panduit Corporation v. Dennison Manufacturing Company*, 227 USPQ 337 (Fed. Cir. 1985). *Crown Operation International, Ltd. v. Solutia Inc.*, 289 F.3d 1367, 1376, 62 USPQ2d 1917 (Fed. Cir. 2002).

The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. *In re Gordon*, 733 F.2d at 902, 221 USPQ at 1127. *In re Fritch*, 23 USPQ 2d 1780, 1783-1784 (Fed. Cir.

1992).

It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed Invention is rendered obvious. *In re Fritch*, 23 USPQ 2nd 1780 at 1784 (Fed. Cir. 1992); and *In re Gorman*, 933 Fed. 2nd 982, 987, 18 USPQ 2d 1885, 1888 (Fed. Cir. 1991). One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 Fed. 2d at 1075, 5 USPQ 2d at 1600. *In re Fritch*, 23 USPQ 2d 1780 at 1784 (Fed. Cir. 1992). Where the cited references do not teach how to make the particular combinations needed to arrive at the invention called for by Appellants' claims, the claimed invention cannot be deemed "obvious". *Ex parte Levingood*, 1993.

It is also well established that a prior art reference must be evaluated in its entirety and that the prior art must be evaluated as a whole. *W.L. Gore and Associates, Inc. v. Garlock, Inc.*, 220 USPQ 303 (Fed. Cir. 1983). Where neither any reference considered in its entirety, nor the prior art as a whole, suggests the combination claimed, the invention is non-obvious. *Fromson v. Advance Offset Plate, Inc.*, 225 USPQ 26 (Fed. Cir. 1985).

Discussion Regarding Claim 22

With respect to the first aspect of *prima facie* obviousness, there is no suggestion or motivation to modify the Kline patent to arrive at the claimed invention. By virtue of her citation of *In re Aller*, Appellants believe that the Examiner is relying on Section 2144.05 of the MPEP for this portion of the rejection. If this is the case, Appellants respectfully disagree with the Examiner's reliance on this section. Section 2144.05 of the MPEP is directed to the "Obviousness of Ranges" or "Optimization of Ranges." The general conditions of Independent Claim 22 are not disclosed by the prior art because the Kline patent does not disclose such values at all. Additionally, *In re Antonie*, holds that a particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation. *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977). The Examiner has not shown where the Kline patent discloses that the flexural modulus of a polymeric material for a fastener material is a result-effective variable. The Examiner has not established a *prima facie* case of obviousness because she has not identified the necessary motivation to modify the Kline patent to arrive at the claimed invention.

For at least these reasons, Appellants respectfully submit that Claim 22 is patentable over the Kline patent. Likewise, Appellants respectfully submit that Claims 2, 9, 10, and 15-17 which depend from

Independent Claim 22 are patentable over the Kline patent for at least the reasons stated above.

Accordingly, Appellants respectfully request that the rejection of claims 2, 9-10, 15-17, and 22 under 35 U.S.C. §§102(b) and 103(a) be reversed.

Conclusion

For the reasons stated above, it is Appellants' position that the Examiner's rejection of claims 2, 9-10, 15-17 and 22 has been shown to be untenable and should be reversed by the Board.

Please charge the \$500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875.

The undersigned may be reached at: 920-721-2747

Respectfully submitted,

PAUL J. DATTA ET AL.

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Claims Appendix

The claims on appeal are:

Claim 2. The absorbent article of claim 22, wherein the multiple property fastener defines a fastener longitudinal direction, a fastener lateral direction and a fastener area, and there is one said engagement zone covering one half of the fastener area in the fastener longitudinal direction and there is one said non-abrasive zone covering the other half of the fastener area in the fastener longitudinal direction.

Claim 9. The absorbent article of claim 22, wherein the first mechanical fastening material is made from a polypropylene copolymer.

Claim 10. The absorbent article of claim 22, wherein the second mechanical fastening material is made from a polymer selected from elastomeric thermoplastic polymers and metallocene catalyzed polymers.

Claim 15. The absorbent article of claim 22 wherein the multiple property fastener is engageable into the front waist region of the article.

Claim 16. The absorbent article of claim 22 wherein the multiple property fastener is engageable into the back waist region of the article.

Claim 17. The absorbent article of claim 22 wherein the multiple property fastener has a top edge that is generally aligned with one of the waist edges of the article.

Claim 22. A pant-like, prefastened, disposable absorbent article including an absorbent, a front waist region, a back waist region, a crotch region that extends between and connects the waist regions, a longitudinal direction, a lateral direction, an exterior surface, an interior surface opposite the exterior surface, a pair of laterally opposed side edges and a pair of longitudinally opposed waist edges, the absorbent article further comprising:

a multiple property fastener attached in one of the front waist region and the back waist region, the multiple property fastener defining a fastener longitudinal direction, a fastener lateral direction and a fastener area, the multiple property fastener further comprising at least two zones, at least one engagement zone of a first mechanical fastening material and at least one non-abrasive zone of a

second mechanical fastening material wherein the first mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus greater than about 30 kilopounds per square inch and the second mechanical fastening material is comprised of a polymeric material selected to have a flexural modulus between about 7 kilopounds per square inch and about 30 kilopounds per square inch.

Evidence Appendix

No evidence is submitted.

Related Proceedings Appendix

No known related proceedings.

CERTIFICATE OF TRANSMISSION

I, Barbara D. Miller, hereby certify that on April 6, 2007 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.

Typed or printed name of person signing this certificate:

Tammi Langin

Signature:

Tammi Langin